IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 679 OF 2005

Baliram Krishna Vichare.. .. .. Appellant.
Versus
Ashok K. Jain... ... ... Respondent.

Mr. Sandesh D. Patil for the Appellant.

Ms.D.S.Bobhate for the Respondents.

CORAM : S. B. DESHMUKH, J.

DATED : 18TH AUGUST, 2006.

P.C. :

Heard the learned Counsel for the parties.

2. The defendant in Special Civil Suit No. 420 of 1999, is appellant in this second appeal and the respondent, is the plaintiff in the said suit. The parties hereinafter, for convenience, are referred to as the plaintiff and the defendant in Special Civil Suit No.420 of 1999.

3. The plaintiff had filed the Special Civil Suit No. 420 of 1999 for declaration and possession of the suit property. The defendant, after service of summons, entered appearance and filed written statement. The trial Court, framed four issues, considering the

pleading of the parties. The issue no.1, framed by the trial Court, was in respect of the allegation of the plaintiff that the defendant has committed breach of agreement by making non-payment. The finding, on this point, of the trial Court on issue no.1 is against the plaintiff. The termination of contract, according to the plaintiff, is issue no.2 and finding recorded by the trial court is again against the plaintiff. The entitlement of possession of the suit property of the plaintiff is negatived by the trial Court while recording finding on issue no.3. The reasons for arriving at the finding on issue nos.1, 2 and 3 are recorded by the trial Court in its judgment and decree passed on 3rd November, 2003.

4. The judgment and decree passed by the trial Court in Special Civil Suit No. 420 of 1999, was assailed by filing first appeal under Section 96 of the Code of Civil Procedure by the plaintiff. It was Civil Appeal No. 3 of 2004 in the Court of the 3rd Additional District Judge, Thane. The 3rd Additional District Judge, Thane, after hearing the parties, allowed the appeal by its judgment and decree passed on 3rd February, 2005. The first appellate court, quashed and set aside the judgment and decree passed by the trial court, dismissing the Special Civil Suit No. 420 of 1999. The agreement dated 10th August, 1992 and the

Supplementary Agreement dated 15th June, 1993, regarding suit property, executed by the plaintiff, stand cancelled in view of the judgment of the first appellate court. The first appellate court, in clause-4 of the operative part of the judgment delivered on 3rd February, 2005, directed refund to the defendant, excluding the earnest amount in respect of the suit property. By clause (5) of the operative part of the judgment, the first appellate court, directed the defendant to handover vacant and peaceful possession of the suit property to the plaintiff within three months from the date of the order. It is this judgment and decree passed by the first appellate court in Civil Appeal No. 3 of 2004, is challenged by the defendant in this Second Appeal as noted above.

5. The learned Counsel for the appellant, canvassed two submissions. According to him, the Suit filed on behalf of the plaintiff, is barred by law of limitation. In support of his submission, the learned Counsel for the defendant, referred to the plaint itself. According to the learned Counsel for the defendant, in paragraph no.3 of the plaint, a statement is made that "the defendant also paid earnest money of Rs.10,000/- to the plaintiff upon execution of the said agreement". The agreement in question is not in dispute and is dated 10th August, 1992. He has also referred to the cause of action,

mentioned by the plaintiff in paragraph no.13 of the suit, as 14th October, 1999. With this cause of action, he has referred to the date of filing of the suit as 29th November, 1999. In the written statement, he has pointed out that, defendant has raised this plea in paragraph no.1. It is contended by the defendant in the written statement, in paragraph no.1, that the suit filed by the plaintiff is time barred. The alleged agreement is dated 10th August, 1992 (the date is incorrect, the agreement is dated 10th October, 1992) and Supplementary Agreement is dated 15th June, 1993, however, the suit is filed on 25th November, 1999. According to the defendant, therefore, the suit is barred by law of limitation. On my query, learned Counsel for the appellant, fairly admitted that the issue of limitation was not framed by the trial Court. Since the suit filed by the plaintiff was dismissed by the trial Court, according to him, there was no occasion for the defendant to file appeal before the first appellate court and raise a ground of limitation. He has also fairly admitted that while hearing the first appeal No.3 of 2004, filed on behalf of the original plaintiff, such grievance, not having framed the issue of limitation, was not raised on behalf of the defendant. Since there was no issue framed by the trial court, obviously, there was no point for determination framed by the first appellate court.

6. It is true, that the issue of limitation was not framed by the trial Court, neither point for determination seems to have been framed by the first appellate court. However, from the judgment of the first appellate court and more specifically, paragraph no.13 of the judgment, it appears that the learned first appellate court has considered the grievance raised on behalf of the defendant regarding the alleged prematurity of the suit. The first appellate court, has referred to the supplementary agreement, which shows the last instalment, agreed to be paid on 15th June, 2000. The first appellate court has also noted the date of filing of the suit as 25th August, 1999 (correct date is 29th November, 1999), and thereafter observed that there was no merit in this argument on behalf of the defendant that the suit is premature. The first appellate court, was of the opinion that in view of clause-4 of the agreement, Exhibit 22, i.e. supplementary agreement, it is specifically mentioned that even in case of one default, the plaintiff will be entitled to cancel the agreement. Therefore, it appears that the argument advanced on behalf of the defendant before the first appellate court, was only in respect of the alleged prematurity of the suit.

7. I have considered the submission of the learned

Counsel for the appellant in relation to the limitation. The plea of limitation, is a question of fact and law. The parties must have an opportunity, for leading the evidence. In case of framing of issue by the trial court, parties would know, for which issue, they have to lead evidence. In the absence of any issue, in the present case, it appears, there was no evidence and no finding was recorded. Such a grievance cannot be raised before this Court, considering the second appeal within the parameters of Section 100 of the Code of Civil Procedure. By way of second appeal, no party can be allowed to have a third trial of the suit. In my view, therefore, this ground, cannot be accepted to be a ground involving substantial question of law in this second appeal.

8. Apart from this, even if for the sake of argument, the submission of the learned Counsel for the appellant is to be considered, one has to keep in mind that the initial agreement is dated 10th October, 1992. Undisputedly, parties have entered into another agreement, which is called as supplementary agreement dated 15th June, 2000. The learned Counsel for the appellant has made available the ordinary copy of these two agreements. In the first agreement, no period for completion of the transaction between the parties is referred to. In clause-4, it is mentioned that on

receipt of the entire amount of consideration by the party of the first part, the party of the first part shall transfer all the relevant papers in favour of the purchaser. It seems that the Sale Deed was to be executed, after receipt of the entire amount of consideration, being the price for purchase of the property fixed between the parties by this initial agreement, is Rs.1,05,000/-. The amount of Rs.10,000/-, was paid by the defendant towards the earnest money. In the background of this agreement, it is alleged by the plaintiff that the defendant, did not comply with the first agreement and did not pay the entire amount agreed between the parties. The supplementary agreement, according to the plaintiff, was only because of the failure on the part of the defendant for making entire payment as agreed between the parties. This submission is accepted by the courts below, on appreciation of the oral as well as documentary evidence. The supplementary agreement, manifest that various instalments have been agreed between the parties on various dates. Last date agreed between the parties, for the last payment of Rs.5,000/- on 15th June, 2000. In clause-4, it is specifically agreed between the parties that in case of lapse of one default on the part of the defendant regarding payment, the appellant shall have a right to cancel the agreement. These two agreements, have to be read, in consonance with the pleading and the evidence

led on behalf of the parties. In this view of the matter, in my view, the suit filed on behalf of the plaintiff is neither barred by the law of limitation nor premature.

9. The learned Counsel for the appellant, invited my attention to clause-4 of the operative part of the judgment, which is reproduced hereinbelow for convenience.

> "4. The plaintiff to refund to the defendant the amount paid by him, excluding earnest amount in respect of the said Flat."

10. The learned Counsel for the appellant, justifiably submits, that the first appellate court, did not put the figure of such amount directed to be refunded to the defendant. He also submits that in the entire judgment of the first appellate court no such finding is recorded regarding specific amount to be refunded by the plaintiff to the defendant.

11. This being a judgment of the first appellate court, reversing the judgment and decree passed by the trial court, I have carefully considered the submissions made on behalf of the defendant / appellant. In paragraph no.8 of the judgment, the first appellate court has

referred to the plea set up by the defendant in respect of the payments, allegedly made to the plaintiff. The first appellate court has observed, "Now the fact that, the defendant had defaulted in paying the instalments as per the schedule, has been admitted by the defendant himself, even though it is his contention that he had paid Rs.80,000/- and he is ready to pay the balance amount". The first appellate court, therefore, on appreciation of the oral as well as documentary evidence, recorded a finding that the defendant, though has contended that he had paid Rs.80,000/-, no such convincing evidence is led by the defendant. The first appellate court, in paragraph no. 11, observed that an amount of Rs.20,000/- is paid by the defendant to the plaintiff. In paragraph no.14, the first appellate court, has recorded the submission made on behalf of the defendant that the defendant is ready to pay the balance of Rs.25,000/- to the plaintiff. This submission seems to be on the basis of the plea set up by the defendant that he has paid Rs.80,000/-, against the purchase price of Rs.1,05,000/-. However, the payment of Rs.80,000/- by the defendant to the plaintiff is not accepted by the first appellate court. There are two agreements on record, which are exhibited documents. According to the learned Counsel for the plaintiff, if the plaint allegations are accepted, an amount of Rs.50,000/- including the earnest money, is paid by the defendant to

the plaintiff. The first appellate court has decided the question of fact, in relation to the default committed by the defendant, in making payment as per even the subsequent agreement i.e. supplementary agreement dated 15th June, 1993. The first appellate court has also directed the refund to the defendant excluding the amount of the earnest money. No reason is assigned, for withholding the amount of earnest money. Probably, since the defendant is in possession of the suit property, the first appellate court must have withhold the payment of earnest money to the tune of Rs.10,000/-. Only because the first appellate court, has committed a mistake by not putting the figure of amount in clause -4 of the operative part of the judgment, in my view, there is no point in admitting this appeal and keeping it pending for indefinite period of time. Since no substantial question of law is involved in this appeal, the appeal can be disposed of with appropriate direction in relation to the refund of money in favour of the defendant.

12. I am accepting the submission of the learned Counsel for the appellant - defendant that from its plaint allegation, it appears that Rs.50,000/- was received by the plaintiff on account of transaction between the parties. I also considered the fact that the defendant is in occupation of the suit property,

i.e. a flat, admeasuring about 185 sq. ft. situate at Bhayandar, Dist. Thane, till today. In my view, therefore, the plaintiff can be directed to refund the amount of Rs.40,000/- within a period of four weeks from today.

13. In the result, since no substantial question of law is involved in this second appeal, the second appeal is dismissed, However, with a little modification in the judgement and decree passed by the first appellate court, to the extent, that the plaintiff shall refund the amount of Rs.40,000/- to the defendant within a period of four weeks from today. With this modification, the judgment and decree passed by the first Appellate Court is upheld.

14. The learned Counsel, appearing for the plaintiff, on instruction, seeks permission to deposit the said amount of Rs.40,000/- in this Court. Permission, accordingly, is granted.

15. This Court, by earlier order had granted ad-interim relief in favour of the defendant/appellant. This appeal, after hearing the parties, is dismissed and, therefore, the ad-interim relief granted in favour of the appellant also stands vacated.

16. The learned Counsel for the defendant, on instruction, submits, that the appellant / defendant along with all adult members residing in the suit property, would file an undertaking in the usual form, that they shall not part with possession or create any third party interest in relation to the suit property during the period of this four weeks. Such an undertaking to be filed in this Court within a period of two weeks from today.

17. No costs.

Sd/-

(S.B.DESHMUKH, J.)